UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-scc

- x

In re

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtor.

- x

Case No. 08-01420-scc (SIPA)

- x

In re

LEHMAN BROTHERS INC.,

Debtor.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, NY 10004

May 10, 2016

10:02 AM

B E F O R E :

HON SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

Hearing re: Doc #13494 Trustees Motion for Authorization to Sell Certain Debt Instruments Pursuant to SIPA Section 78fff-1(b) and Sections 105 and 363 of the Bankruptcy Code

Hearing re: Doc #13493 Trustees Motion for an Order Authorizing the Abandonment of Certain Lehman Brothers Inc. Data

Hearing re: Doc #12194 Trustee's Motion for an Order Regarding Certain Repurchase Agreement Claims

Hearing re: Doc #51685 Amended Omnibus Application of certain members of the Official Committee of Unsecured Creditors for payment of fees and reimbursement of expenses

Hearing re: Doc #52574 Second Motion in Aid of Alternative Dispute Resolution Procedures Order for Indemnification Claims of the Debtors Against Mortgage Loan Sellers

Hearing re: Doc #51006 Plan Administrators Five Hundred Ninth Omnibus Objection to Claims (No Liability Claims)

Hearing re: Doc# 13592 Statement / Notice of Revised Proposed Order Authorizing the Abandonment of Certain Lehman Brothers Inc. Data (related document(s)13493)

Hearing re: Doc# 13595 Notice of Hearing / Notice of Agenda of Matters Scheduled for the Ninety-Seventh Omnibus and Claims Hearing on May 10, 2016 at 10:00 a.m.

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Please have a seat. How is everyone today? All right, I'm ready when you are.

MR. MARGOLIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. MARGOLIN: Jeffrey Margolin, Hughes Hubbard & Reed for Mr. Giddens, the LBI Trustee. We have three matters on the LBI portion of the agenda this morning.

THE COURT: Yes.

MR. MARGOLIN: Two are uncontested and one is contested. If it's okay with you, we'll proceed with the order set forth in the agenda.

THE COURT: Certainly.

MR. MARGOLIN: Your Honor, the first matter on the agenda is the Trustee's uncontested motion for authority to abandon and destroy certain data and documents maintained by the LBI estate.

With many phases of liquidation complete, this motion is the second in a series of abandonment motions that the Trustee anticipates filing with the Court as its professionals determine that certain documents and data are no longer necessary to effectuate the remaining work streams and thereby are ripe for abandonment and destruction, furtherance of the Trustee's goals of reducing administrative expenditures and facilitating an orderly

closure of the estate.

Your Honor approved a prior abandonment motion back in February 2015 and that has been effectuated. Today, Your Honor, on the current motion, we seek authority to abandon and destroy certain electronic databases legacy database archives, backup tapes, certain paper documents and other wind-down materials as further described in the motion.

The abandonment of this data and documents will provide substantial cost savings to the LBI estate. We received a number of inquiries, Your Honor, regarding the motion. Two enquiries from Barclays, and Claimants subject to the Trustee's 260th omnibus objection to general Creditor claims, what we call the A Katz Claimants, which is fully submitted before Your Honor, focused on certain of the electronic databases.

After discussions with these parties, we identified and determined that certain folders, what we call the Libby discovery database, this was the database that was created for attorney work product in connection with the Libby litigation, which was resolved in 2013, contained certain documents and data received from or produced to third parties in which the Trustee may not have access to original source materials that would allow him to replicate this particular data and documents.

This is a very small amount of data and documents, less than one million of the approximately 23 million data and documents contained in this database.

As a result, Your Honor, although there is no use to the Trustee of these data and documents but it costs the estate approximately $50,000 to maintain these folders in the database per year, we've agreed to carve this out from the abandonment motion.

This carve-out is reflected in the revised proposed order filed with the Court yesterday. Again, Your Honor, no responses were received to the motion. SIPC supports this motion, and Mr. Caputo is in the courtroom today.

Unless the Court has any questions, the Trustee respectfully requests entry of the revised proposed order as yet another step toward winding down and closing the estate.

THE COURT: All right, very well. Let me ask if anyone in the courtroom wishes to be heard with respect to the Trustee's motion for an order authorizing the abandonment of certain Lehman Brothers, Inc. data. All right, very well, we'll enter the order. Thank you.

MR. MARGOLIN: Thank you, Your Honor. We'll submit an order. The next matter will be handled by my colleague, Marlena Frantzides.

THE COURT: Thank you.

MR. MARGOLIN: Thank you.

THE COURT: Good morning.

MS. FRANTZIDES: Good morning, Your Honor. Marlena Frantzides of Hughes Hubbard & Reed on behalf of the SIPA Trustee. The second matter on the LBI hearing agenda today is the Trustee's motion for authorization to sell certain debt instruments supported by the declaration of Christopher K. Kiplok, who is in the Courtroom today. The motion is uncontested.

By this motion, the Trustee is seeking authorization to sell three cross-collateralized, subordinated bonds relating to the Harvest Grove, Schering Park and Tarrant County Housing projects, which I will refer to as the debt instruments.

These debt instruments were issued during the course of the liquidation when certain prior subordinated bonds were cancelled in connection with the sale of the underlying housing projects.

Each one of the debt instruments is highly subordinated, so the Trustee determined, in conjunction with his financial advisors, that it was unlikely they were to have any real economic value to any party outside of the capital structure.

So, after negotiating in negotiations and discussions with other debt holders, which includes LBHI,

who holds subordinated bonds related to Sunset Ridge, which is another housing project within the capital structure, Merrill Lynch, the sole senior bondholder made an offer to purchase the debt instruments for $1 million dollars.

As of April 19th, when this motion was filed, Merrill Lynch was the highest bidder and only party that had made a firm offer to purchase the debt instruments, however the motion made clear that to the extent there was any other interested party, the Trustee would consider higher or better offers up to and until Thursday, May 5th, 2016.

On Thursday, May 5th, LBHI made an overbid of $1.1 million dollars for the debt instruments, so on Friday, May 6th, a competitive auction was conducted by the Trustee's professionals, representatives from LBHI and Merrill Lynch attended the auction and bidding proceeded with each party bidding in increments of at least $100,000.

Merrill Lynch was the winner of the auction, so bidding the highest bid for $4.7 million dollars and I'm happy to report, Your Honor, that we're prepared to go forward with the sale of the debt instruments for the purchase price of $4.7 million to Merrill Lynch today.

Additionally, during the course of the discussion, LBHI approached the Trustee's professionals requesting that it be made clear that the sale of the LBI debt instruments did not affect LBHI's rights with respect to these Sunset

Ridge subordinated bonds.

The Trustee, Merrill Lynch and LBHI were able to reach an agreement regarding appropriate language and that is reflected in the revised order and amended assignment agreement filed into the Court on Friday, May 6th.

The Trustee has determined, in consultation with his professionals, that the sale of the debt instruments to Merrill Lynch for -- excuse me, $4.7 million, represents the best means of maximizing the value of the debt instruments for the benefit of the LBI estate and Creditors and no responses were received to the motion.

Accordingly, the Trustee respectfully requests that Your Honor grant the motion and approve the sale of the debt instruments to Merrill Lynch.

THE COURT: All right. For purposes of good order, shall we enter Mr. Kiplok's declaration into the record?

MS. FRANTZIDES: Yes.

THE COURT: All right. And ask, is there anybody here who would like to cross-examine Mr. Kiplok? Does anyone else have anything they wish to say with respect to the Trustee's motion for authorization to sell the debt instruments that have been described? All right, I congratulate the Trustee for constructing a process that generated so much value for the estate for the benefit of

the unsecured Creditors, since, as I think everyone knows, the customer claims have been paid in full, so I will happily approve the motion. Thank you.

MS. FRANTZIDES: Thank you, Your Honor. All right, so that brings us to the motion regarding the repo claims?

MR. HOFFMAN: Correct.

THE COURT: All right. And I take it you are Mr. Hoffman?

MR. HOFFMAN: Yes, I am, Your Honor.

THE COURT: All right, very well. I've read the papers, which I found -- I find the situation very dismaying and I'm struggling to understand what it is, Mr. Hoffman, that you think happened and what you think ought to happen. We have a legal issue that has been up to the Supreme Court, cert denied. It's as final as it gets.

Moreover, the path to that point is -- includes stipulation that your clients signed while they were represented by the Clearly Gottlieb firm that made crystal clear that once there was a final order on the status of these repurchase claims, your clients would be bound by that, and there were certain conditions that were imposed, which were not satisfied by the rulings that were issued through the Second Circuit.

But now we're here and you seem to be taking the

position that none of that happened, that you ought to get discovery and I'm just at a loss, really, to understand.

And also I think that your reaction to the Trustee's suggestion that proceeding would be a violation of the stipulation, which you characterize as -- I think you use the word "hectoring," to me, is an appropriate, heads up if you will, that the Trustee can't figure out why or how you have an avenue to pursue your current claims. So I think, unless you have something additional you'd like to add, that it might be most expeditious to hear from Mr. Hoffman first.

MR. SALZMAN: That works for me, thank you, Your Honor.

THE COURT: Okay, thank you.

MR. HOFFMAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. HOFFMAN: I believe our position starts with the word of the stipulation itself that was signed, that says in Paragraph 1, that the non-participating Claimants, of which my clients are among that group, will not serve nor be subject to discovery with respect to any of the non-participating objections unless and until the representative objections have been litigated to a final order, or have been settled.

THE COURT: Okay.

MR. HOFFMAN: To me, that does not exclude the possibility of discovery that indicates that there can be discovery after the representative cases --

THE COURT: Well, but that's putting the cart before the house because that --

MR. HOFFMAN: Okay, well that's Paragraph 1.

THE COURT: -- that provision, to me, that provision was crafted -- I don't know this, but it's common sense, that that provision was crafted to deal with the situation in which someone said that there was a factual issue with respect to the paper that constitutes a repo claim, which has not occurred here.

MR. HOFFMAN: I can get to the substance if you -- if I will but I'll just go through the -- the next paragraph of the stipulation says --

THE COURT: Which paragraph are you on?

MR. HOFFMAN: Paragraph 2.

THE COURT: Okay.

MR. HOFFMAN: And it says: "Any legal rulings made by the Bankruptcy Court," and all the other courts --

THE COURT: Right.

MR. HOFFMAN: "shall apply in any litigation with respect to the non-participating objections. That does not say -- that does not say that their result is your result. It says that the rulings from the other cases will apply in

our litigation. It simply does not say what the Trustee says it says.

THE COURT: Okay, well, what do you -- okay, so I hear the words, but what -- so the Second Circuit has ruled --

MR. HOFFMAN: Okay, I can explain how our cases is different, if you'd like me to.

THE COURT: Well, let's just stick with this for a moment, okay?

MR. HOFFMAN: Okay.

THE COURT: The Second Circuit has ruled that the repo claims, which it examined --

MR. HOFFMAN: No, they've only examined one, Your Honor, correct?

THE COURT: Yes. Issued pursuant to the same master agreement as yours.

MR. HOFFMAN: I don't know if it was precisely the same, but similar.

THE COURT: I think it's the same.

MR. HOFFMAN: Okay.

THE COURT: Okay? They said that those claims are not customer claims.

MR. HOFFMAN: Correct.

THE COURT: Okay? And so what you're -- I think where you're going with this is that there are other facts

and circumstances incident to your client's relationship with LBI that somehow would enable you to distinguish your claims from those claims.

MR. HOFFMAN: Well, first of all, there was only one claim and the Court itself, the Second Circuit explicitly held -- if there's one thing the Second Circuit clearly held is that if you can show entrustment, then you are a SIPA customer Claimant, SIPA -- you're a SIPA customer, okay? The Court said that. The Court didn't say anything about repos in general or anything like that. It did say Doral did not have a customer claim. It didn't say you could never be a customer -- a repo agreement somehow negates customer status based on anything else. It doesn't say that in there. It says Doral doesn't have one and I'll explain while Doral is a reverse repo --

THE COURT: I'm pretty sure that the Second Circuit thought that they were saying the opposite of what you're saying. I'm pretty sure that the Second Circuit thought that they were saying that a claim of the type that was before them --

MR. HOFFMAN: Okay.

THE COURT: -- right, was not a customer claim, and in so doing, what the analysis that they were applying was looking at whether or not there was entrustment and they found in that connection that in connection with a repo

claim, there was not. Their ruling was not this is a repo claim but the world at large, if you can demonstrate or allege entrustment, you don't fall within the ambit of the ruling.

That's not a fair reading of what the Second Circuit did and this isn't the only case where time after time, folks seek to distinguish themselves from certain rulings regarding customer status. There was a series of appeals related to First Bank Puerto Rico matter in which there were rulings related to customer status and a subsequent Claimant came in and said, but that doesn't apply to me because X, Y and Z.

Here, the extraordinary thing about this is that a fair reading of the Second Circuit's ruling precludes the allowance of your client's claims as customer claims by itself, but in addition, your clients signed a stipulation in which they agreed to certain rules of the road, and now you're coming back and saying that the words on that page, which they signed, don't mean what they say. And that's -- that's pretty extraordinary.

MR. HOFFMAN: Well, if I may, I mean, would the Court like me to explain why I think this claim was different than the one that was before the Second Circuit?

THE COURT: Well, you first have to navigate your way through the stipulation, which --

MR. HOFFMAN: Okay.

THE COURT: -- which --

MR. HOFFMAN: Sorry.

THE COURT: You didn't read the last phrase in Paragraph 2, which is that it applies unless the Court expressly provides in a ruling that such legal rulings shall not apply to the non-participating objections, then it gets even more specific because there is the prohibition in Paragraph 3 that you can't seek to distinguish your own claim. So, we have belt and we have suspenders.

MR. HOFFMAN: Okay, can I take those one at a time?

THE COURT: Sure. Mm hmm.

MR. HOFFMAN: Okay. First of all, now, what does that mean, expressly provides in any ruling shall not apply to the non-participating objection? So does the mean that the Second Circuit was going to say, we're deciding Doral's case but these other people are before the Bankruptcy Court who are not before us, that doesn't apply to them? I don't think you can agree to a thing like this. I don't think you can agree and say, well, if the Court goes off, you know -- I think that what happened is the Court did see -- the Court --

THE COURT: But you -- wait -- just to review, your clients represented by Cleary Gottlieb, signed the

stipulation. It's a contract and it's a court order.

MR. HOFFMAN: Okay.

THE COURT: Okay? But now you're saying, boy, that was crazy. Why did they agree to that?

MR. HOFFMAN: The Court did expressly say that there is a group of people who would not be covered by this ruling and those are people who can have and show entrustment. They didn't call us out by name. it doesn't say Diego Katz, it doesn't say Marcello Katz. It doesn't say the parties to the stipulation of June, whatever, 2011. It says --

THE COURT: Do you have a view as to why all the other non-participating claimants who signed this stipulation are not standing here with you today and who accepted their status as unsecured Claimants rather than customer Claimants?

MR. HOFFMAN: First of all, I think it's -- all of them appear to be some sorts of institutions. I think as Mr. Salzman was indicating, I think one of the other Cleary Gottlieb clients was Goldman Sachs something or other. This is an entirely different case. This is retail customers who were having retail accounts in a regular brokered account --

THE COURT: Wait, I'm not following the distinction. So, a financial institution that has shareholders and other stakeholders wouldn't pursue a valid

claim?

MR. HOFFMAN: I have no idea what their claims there, and I think to cast aspersions like the Trustee is here, to say that like, we can't defend ourselves without revealing the attorney/client privilege to suggest that oh, well, Cleary Gottlieb -- Cleary Gottlieb's other clients didn't pursue this, so why are you doing that? How are we supposed to defend that? The suggestion there is that Clary Gottlieb told my client he lost, right?

THE COURT: Well, respectfully, by the operation of the stipulation, that is what happened. And now, you have come up -- you are backing away from language that your clients agreed to, represented by predecessor counsel, and we haven't even gotten to three, which says: "The Trustee and the non-participating Claimants each agree not to distinguish the repo claims of the non-participating Claimants from the repo claims of the representative Claimants for purposes of any legal rulings made by the Bankruptcy Court or an Appellate Court in connection with with the litigation of any of the representative objections. Notwithstanding the foregoing, if and only if the Bankruptcy Court or an Appellate Court makes any legal rulings that distinguish among the repo claims of the representative Claimants that the upper Court had to have made a ruling that distinguishes among the repo claims of the

representative Claimants," okay?

That's different -- slightly different provision than the last provision of Paragraph 2. Then: "each non-participating claimant shall not be restricted." So, under the clear words of Paragraph 3, your clients are not entitled to seek to distinguish its claim from the repo claims of the representative Claimants that were disposed of by the Second Circuit.

MR. HOFFMAN: Okay, so can I get to the issue of distinguishing?

THE COURT: Sure.

MR. HOFFMAN: Okay. That is clearly a reference to the stipulation of facts that the Trustee and the representative Claimants never produced. So how are we supposed to know --

THE COURT: Where does it say that? It doesn't -- I just read the words. It does not reference a stipulation of facts.

MR. HOFFMAN: Okay, so how -- how is my client supposed to know what the facts of those claims are? The entire matter, largely, was filed under seal in this Court. I've never seen any of the deposition transcripts from the Trustee. There's never been any discovery given to my client. How is he supposed to know that his facts are not the same as the facts of --

THE COURT: Okay, you know what we have, Mr. Hoffman? Here's what we have. What you're saying is that you believe -- you're arguing for a basis to be relieved of the agreement that your clients signed, because that's in essence what you're saying, because you're not denying now that the words mean what they say, but you're saying it really can't -- it can't have meant that because that wouldn't be fair or it can't have meant that because of a number of reasons. So I mean, it's basically like coming in after the fact and alleging something like fraud in the inducement or some basis on which to collaterally attack this document. But there isn't anything. There isn't anything. There was a ruling by the Second Circuit that said that repo claims, that by its terms, include the types of claims that your client holds, are not customer claims.

MR. HOFFMAN: I think --

THE COURT: And I -- and I -- look, I understand the distinction between an institutional investor and these are individuals. I understand that, and they lost money. But it -- things can't turn on that distinction, right?

MR. HOFFMAN: I perfectly understand what you're saying, Your Honor, but let me --

THE COURT: Go ahead.

MR. HOFFMAN: -- let me get to the part where I think there is the actual distinction in the facts and I'll

-- I'll just be a second --

THE COURT: But how do I get past --

MR. HOFFMAN: Okay --

THE COURT: -- how do I allow you distinguish the claims of your clients when this binding stipulation says that you agree not to?

MR. HOFFMAN: Well, I would say, first of all, that the previous paragraph that says -- where the Second Circuit expressly makes the distinction --

THE COURT: No, but forget about that paragraph.

MR. HOFFMAN: Okay, well --

THE COURT: Pretend that paragraph doesn't exist.

MR. HOFFMAN: Okay, pretend that, all right.

THE COURT: Just Paragraph 3.

MR. HOFFMAN: All right, I would say this. Look, the other stipulation that's between the so-called representative Claimants and the Trustee was attached as an Exhibit to this order, to this stipulation order, and it was itself so ordered. In that order, the Trustee and the representative Claimants to produce this stipulation of facts, an agreed set of facts that they were going to litigate on, okay? And they never did that.

THE COURT: Okay, so if you were -- so then you would have expected Paragraph 3 to say, subject to the execution of that stipulation --

MR. HOFFMAN: It's not perfect.

THE COURT: -- we agree.

MR. HOFFMAN: I would have expected it to say a lot of other things if it says what the Trustee says it says, but it's not perfect, okay? But where is it going to come from? Where does that set of facts that we're going to distinguish ourselves from going to come from? And it's got to come from that stipulation, okay? That's the only source of it. The whole thing was filed under seal. They didn't allow us any discovery. How are we supposed to know what claims were really litigated and what weren't? How do I I know that there aren't facts in there somewhere --

THE COURT: Well, your clients chose to sign those. It was not predicated on the execution of a stipulation of undisputed facts.

MR. HOFFMAN: It was predicated on the stipulation that was an actual exhibit to this other second order. It was part of it as an exhibit. And they want to shut us down and they didn't dot all the Is and cross all the Ts, okay? I mean, maybe this was -- would be the most efficient way to have done it, maybe in retrospect the Trustee, you know, they didn't do what they were supposed to do, and if they're going to shut us down, take away everything and say you don't even have a right to be heard, I think they have to be taking care of every single detail.

And one of those details, and it's not a small one, because I did include -- I showed you that Mr. -- one of the other counsel did, on behalf of the group, I was participating in the group on behalf of another Claimant at the time, sent that email to Ms. Hansa about -- that that was a major concern, the contents of this stipulation. Now, that the people from Cleary Gottlieb or wherever, I don't know what Cleary Gottlieb is so important -- you know, but did they screw up and not put the right language in there? I don't know if they did or not, but that thing was obviously the place where the thing to be distinguished from was going to come from.

THE COURT: I have a stipulation that's clear on its face that was voluntarily signed by parties that were represented by sophisticated counsel, and now there's been an adverse ruling of the Second Circuit and what you're telling me is that it should have been drafted differently, it should have been drafted better, you're not bound, you want to just keep going, and that's just simply not the way it works.

MR. HOFFMAN: I'm not saying that I'm not bound to the stipulation, or my clients aren't bound to the stipulation.

THE COURT: You're absolutely saying that your clients aren't bound by the stipulation.

MR. HOFFMAN: Okay --

THE COURT: That --

MR. HOFFMAN: -- in my view, I'm coming back to what I said, that Judge Peck himself said in the TBA case, is what a test case means, meaning we decide the case and you know, that's the rule of the case for the -- that's the law of the case for the other people but if you can distinguish yourself, that's it, and I think that that's where all this boils down to and gets us back so --

THE COURT: That's exactly right --

MR. HOFFMAN: Yeah.

THE COURT: -- except that in this case, you agreed that you weren't going to try to distinguish yourself. You absolutely correctly described the procedure of a test case, but here, your clients agreed to not seek to distinguish themselves. That's what they agreed to.

MR. HOFFMAN: Well, I'm just -- my point on that is that if there is any distinction to be made, a, I think that would be overruled by the Second Circuit thing. I understand the Court's point on this other point. However, that the distinguishing has to come from that stipulation of facts that the Trustee and the other guys, the representative people, never produced. They never did it.

THE COURT: And I will say --

MR. HOFFMAN: It was Court ordered, they have to

do it.

THE COURT: And I will say again that Paragraph 3 doesn't say that, subject to the submission or the agreement on a stipulation of undisputed facts, comma, everyone agrees to this. That -- it doesn't say that. So, your view now is it should have said that, but it didn't say that and --

MR. HOFFMAN: Okay, not to -- and -- this will be the last time I'm going to say anything on this --

THE COURT: Okay.

MR. HOFFMAN: -- particular topic, but I do have some more things I'd like to say. But the other thing was part -- what I'm trying to convey is that the original stipulation that set up the representative Claimants was part of this stipulation. It's in this stipulation. It was an exhibit to it, and it itself is so ordered, and then this was so ordered with an exhibit to it, so it's in there. It's not some other separate document. It's part of this document.

THE COURT: Okay.

MR. HOFFMAN: Okay? That's the last thing I'm going to say about that.

THE COURT: Okay.

MR. HOFFMAN: Okay?

THE COURT: Yup.

MR. HOFFMAN: And I would just like -- okay, I

will very quickly tell you why I think this case is -- might be a factual difference from the other cases.

THE COURT: Okay, sure.

MR. HOFFMAN: Okay? All the other cases were reverse repos in which -- and they were termed repos, so Doral or whoever, just to make it simple, has a bunch of securities, they go to -- they went to Lehman Brothers, they say, okay, I'll give you X amount today or $100 million dollars in securities today, you give me $90 million dollars or whatever the deal was and they say, okay, five years from now, we'll come back and we'll switch and you'll give me $95 million, I'll give you the securities back, whatever.

THE COURT: Right.

MR. HOFFMAN: That's more or less the case, right? And then --

THE COURT: Yup.

MR. HOFFMAN: -- then the Second Circuit said, look, in that five-year period of time, Lehman Brothers has no obligation to hold those securities for you, to do anything, whatever, it's a contract. Years later you come back and you know, if they fail to do whatever on that contract then that's just a -- you're just out of luck, right? They have some obligation to make you payments that are equal to the interest or the coupons on the bonds and so forth, but they're not really actually -- they don't even

have to hold the buckets, right? That's -- can we agree that that's more or less what the case -- what the case said? And it said, look, that doesn't make you a repo. That doesn't make you a customer because they have no obligation to hold those securities for you, right? That's the case.

THE COURT: I -- you --

MR. HOFFMAN: Okay.

THE COURT: I get to ask the questions, not you, so.

MR. HOFFMAN: Okay. I just want to make sure I'm not going too far away from the Court's --

THE COURT: I say okay in the sense that I hear you and I'm listening to you.

MR. HOFFMAN: Okay, you hear, me, all right.

THE COURT: Okay?

MR. HOFFMAN: In this case, the securities were not, okay, and I'm 95 -- that's why I need a little discovery so I'm asking for it, I know you're probably not -- I'm not -- probably not going to get it, but I want to tell you why I need it. Because what they were doing, they were doing some options trading on the bonds and then at certain times, they would be owning bonds to cover the options, okay? Now, what the repo was, the way the bonds were held in their account were as the proceeds of a -- they

were the buyers. They were in the situation of Lehman Brothers in the other case, in the cases that went to the Second Circuit, okay? They were the buyers, that's what the confirmations say. Now, they bought them with a lot of margin, so Lehman Brothers isn't going to let you go, it's a million dollars. It was $900,000 or so on margin that each was purchased with, it says they're margin accounts, so that, unlike Lehman Brothers in the Second Circuit case, they could walk away and settle all the bonds and stuff, my clients couldn't do that. Even though they owned them, they owned them subject to their margin lead, okay?

THE COURT: Mm hmm.

MR. HOFFMAN: And they were sitting in their account in some sort of custodial capacity. That is covered, by the way, by the master agreement about when you have proceeds but you leave them in there. I mean, they're people, they don't have their own -- all these fancy DDP acts and so forth, they leave them in there, and that's what I'm talking about. That's what I think the difference is between us and them. We're not saying that a repo created the customer status. We're saying that those bonds sitting in the account that were purchased creates the -- those should have been -- those are entrusted by the brokerage, okay? Not something that's actual -- not something that we're giving, we're taking, you know, like the other guy.

It's like, it's completely arm's length, they shake hands, see you in five years. No, they -- LBI was holding my client's property, my client and several clients' property in each of the accounts because they were the purchasers under the repo agreements. Okay? And that's why I think that is -- that's true.

And as far as all this goes, Mr. Salzman and the Trustee have made a lot of threats, I think is fair to call them, about this --

THE COURT: No, I don't think it's fair to call them threats. I think that -- that what you have is a situation where you have the largest, most complex case of this kind and a Trustee who's trying to do his level best to get rulings and affect an orderly liquidation to return distributions to folks just like your clients. So, in order to do that, it's necessary to lay down certain rules of the road, to set up economies of scale, et cetera. Not at the expense of anybody's due process rights, but in order to avoid, seriatim, people coming back and saying -- and seeking to distinguish themselves, and -- otherwise it would go on forever.

As it is now, you can pick up the newspaper -- I guess people don't pick up the newspaper anymore, but you can look at articles that say, you know, why is Lehman Brothers still going when it's seven, eight years after the

fact? And this is one of those situations where you're saying the Trustee is threatening. The Trustee I think, in good faith, and you, in good faith, representing your clients, are trying to do, you know, trying to get a result. The problem that I have is that by the plain reading of the stipulation, your clients are precluded from doing what you're doing now. That's essentially what it comes down to and you know, I think what you're saying is that, you know, Cleary Gottlieb should have done a better job, should have done a different job, but the words on this page are very clear and I think, you know, to the lawyers' credit, they kept it simple, and applying the simple words, I think you get to a result that your clients are bound. But I'd like to give Mr. Salzman an opportunity, just hypothetically, to respond to your argument that factually distinguishes your client's situation from those that were passed on by the Second Circuit.

MR. HOFFMAN: Thank you.

THE COURT: All right? Thank you.

MR. SALZMAN: Thank you, Your Honor.

THE COURT: Sure.

MR. SALZMAN: I'm Michael Salzman from Hughes Hubbard & Reed on behalf of the LBI Trustee.

I don't hold any brief for Cleary Gottlieb. They did fine by themselves, but I would say that in this case,

they knew what they were doing. This was not a mistake on their part. It is correct that these folks, the Katz Claimants, were subject to master repurchase agreements in a form that was the same as the ones that were litigated and the same that the other people who were stipulated agreed to.

It was clear from the briefing that the case essentially arose -- rose or fell on whether the Second Circuit would accept the ruling from the District of New Jersey in the Bevill, Bresler case and had it done so, we would have had a different outcome, but plainly, that didn't happen, and the stipulation did cut both ways.

If the Second Circuit had ruled in the opposite direction, we would not have been able to stand up here today and say, but the Katz Claimants are different, that was a reverse repo, these folks, the Katz people had straight repos not reverse repos, that was for institutions, these are individual -- we wouldn't have been able to do any of that either. We would have had to accept the ruling and that was a calculation that the Katz's attorney was entitled to make and did make.

So, next, I would just say briefly that there was no secret record. There was parts that were sealed, but there was plenty of briefing. All the briefing was public, there were 40 pages of facts described, so this wasn't done

in the dark.

Further, I would say that the scheduling stipulation to which Mr. Hoffman referred only said, and it was just a scheduling stipulation, that we would endeavor to stipulate. Nothing was conditioned on actually having a stipulation of facts. As in many cases, it proved a waste of time, eventually, and the lawyers on both sides concluded it was better just to proceed on the record. Even if we had had a stipulation, it might have just not been a full stipulation anyway, and the Cleary people understood that.

On the merits, the fact is that these folks got their property back from Lehman because all their accounts were transferred to Barclays, and so whatever was in their account, including securities, was transferred to Barclays. These Katz Claimants circled the N box, the No box, no we are not claiming for securities.

In Paragraph 6 of the limited objection to the Trustee's determination the Cleary filed on behalf of these three sets of Claimants, they said that their damages, that their claim for customer status was about the valuation damage caused by the failure of Lehman to complete the second leg of the repo transaction. The difference between the purchase price Lehman would have had to pay, or was obligated to pay, for the securities (indiscernible).

THE COURT: So what you're describing is different

from what Mr. Hoffman described to me moments ago. He was describing cash that was essentially captive in their accounts.

MR. SALZMAN: There was no cash captive in their account. The account transferred to Barclays. Paragraph 6 -- I'm repeating -- Paragraph 6 of the limited objection filed on behalf of each of these three sets of Katz Claimants says that their claim is based upon the difference in price between the contract price and the valuation of the securities.

And that's why, even though their claim -- their accounts had, I'll say more than $10 million dollars in them, they're not claiming anything like that. They're claiming the difference in value between the two prices, the closeout price and the contract price.

And so, on the merits, I think the Court can be completely confident that these people have a contract claim just like Judge Peck ruled at the beginning of the test case, these are essentially contract claims, or they are contract claims, and that was the rationale all the way up to the Second Circuit. They're contract claims. They're not customer claims. Thank you, Your Honor.

THE COURT: Okay. All right, thank you. Mr. Hoffman, would you like a brief opportunity for rebuttal?

MR. HOFFMAN: Just very briefly, Your Honor. I

don't think -- I think you can look at the exhibits and see that -- I don't think Mr. Salzman is correct. There were securities -- if you look on Exhibit 7 -- exhibit -- I think it's 5, 6, and 7, it says "Margin Account," it shows securities, it says my client bought the securities. You can look at those --

THE COURT: But you're not asking for the return of any securities.

MR. HOFFMAN: Well, they have -- okay. As far as checking those boxes goes, if that is not the basis of the Trustee's motion here, if they're trying to expunge us for some other reason, that -- whether or not they checked this box or that box when they filed their claims or -- I mean, they did not do that through counsel and my understanding is Cleary Gottlieb, who we've all seemed to defer to today, didn't update that, so I don't know exactly what the significance of that --

THE COURT: I'm sorry, are you disagreeing with the way that Mr. Salzman characterized and described the nature of your client's claims?

MR. HOFFMAN: The nature of my clients claims are that they had securities that they had purchased, purchased under repurchase agreements, but they had purchased and they were their property, just like the Second Circuit said, that they're the property of the guy buying them in the thing

until it gets reversed. Now, Lehman Brothers may have had an obligation to buy those back at a certain price, and if that's the -- you know, if the arithmetic comes out safe, it's not for the -- you know -- we weren't going to be getting these securities because they were all subject to margin allowance and so forth.

THE COURT: Okay. All right.

MR. HOFFMAN: But if I just may be heard but -- just for --

THE COURT: Mm hmm.

MR. HOFFMAN: -- ten seconds, thirty seconds, is that look, we're answering a motion here, okay? And I don't know, you know, Mr. Salzman has made a -- in his papers, suggesting -- I've never heard of anybody being sanctioned for answering a motion. It's their motion, you know, and the stipulation order is subject to judicial review. If the Court is going to pass on it and make its ruling then there's nothing that could immunize that from being, you know, looked at by a Court.

THE COURT: Of course now.

MR. HOFFMAN: Okay. Thank you very much.

THE COURT: Of course not. Okay, thank you. We will take it under submission.

MR. SALZMAN: Thank you, Your Honor.

THE COURT: All right, thank you.

MR. MARGOLIN: Your Honor.

THE COURT: Yes.

MR. MARGOLIN: That completes the LBI course in the calendar. Can the LBI team be excused?

THE COURT: Yes, thank you very much.

MR. MARGOLIN: Thank you.

THE COURT: Hello, Ms. Marcus.

MS. MARCUS: Good morning, Your Honor. Jacqueline Marcus, Weil Gotshal & Manges on behalf of Lehman Brothers Holdings, Inc. as plan administrator -- or on behalf of LBHI and its affiliated Debtors. Your Honor, the first matter on the docket today for LBHI is a status conference regarding the amended omnibus application of certain individual Committee members for payment of fees and reimbursement of expenses.

As you may know, Your Honor, the plan administrator has not taken a position regarding this matter, so I defer to the Office of the U.S. Trustee, Ms. Schwartz or anybody else who wants to be heard.

THE COURT: All right, so, it's been a while since we were all together, and it looks like, on December 18th, there was filed something styled "Amended application of certain individual Committee members for payment of fees and reimbursement of expenses," a long pleading that had various declarations attached to it. So that's all I know.

MS. COFFINO: So why don't I give you an update?

THE COURT: Thank you, Ms. Coffino.

MS. COFFINO: May I approach the mic?

THE COURT: Yes.

MS. COFFINO: When we were last before you, it was a long time ago, I realize that, you recognized that it -- what you'd asked us to do, which is basically pull apart our time records and take out fees and time that was not --

THE COURT: Extraordinary.

MS. COFFINO: -- strong enough to be a substantial contribution, that was more normal.

THE COURT: I mean just -- right, just a level set, right? We had -- the case went up to Judge Sullivan --

MS. COFFINO: That's correct.

THE COURT: -- he reversed, and said that he rejected the United States Trustee's position, which was a categorical bar on these seeking reimbursement from the estate for these types of fees, correct?

MS. SCHWARTZ: Your Honor, that's not correct. So, when it's appropriate for me to clarify that, I will do that.

THE COURT: Okay. Well, he -- let me -- maybe I misspoke. He said that under certain circumstances, Committee members could make an application for reimbursement of their individual counsel fees under a

substantial contribution standard.

MS. SCHWARTZ: Your Honor, if you would just bear with me --

THE COURT: Yeah.

MS. SCHWARTZ: -- what Judge Sullivan actually said, which he perceived the other side, understanding our position to be that a Creditor Committee member under no circumstances --

THE COURT: No circumstances.

MS. SCHWARTZ: -- could ever --

THE COURT: That's what I just said.

MS. SCHWARTZ: No, no, but I -- you didn't let me finish, because when they went further for the application for direct certification to the Second Circuit, the United States Trustee counsel clarified to Judge Sullivan that that was not our position and that our position was that a -- just because a Creditor sits on a Creditors' Committee does not bar them from making an application as a Creditor in wearing its Creditor hat, not as a Creditor seeking substantial contribution for the work that the Creditor does as part of its duties as a Creditor Committee member.

What Judge Sullivan said at that hearing, which I brought a copy of the transcript and a copy of the decision for Your Honor, he made it very clear. He said that he perceived, based on the Appellee's briefs, that they

perceived he was setting a new standard for substantial contribution claims when in fact he was not doing that at all. And in fact, what he said was, he was merely restating the standard, and why this means something, Your Honor --

THE COURT: I have to tell you, I don't -- I am not following at all what you're saying.

MS. SCHWARTZ: Okay, well let me try this --

THE COURT: All I know is what I read in Judge Sullivan's opinion.

MS. SCHWARTZ: In that one opinion, not in the subsequent opinion on the motion for the direct cert to the circuit, which I have brought copies for you, Your Honor.

THE COURT: Okay, keep going.

MS. SCHWARTZ: But the point is -- but the point is, he had perceived us, based on what the arguments were at that particular hearing, as taking the position that under no circumstances could a Creditor Committee member ever file a motion for a substantial contribution and he rejected that.

THE COURT: But -- I'm sorry, in his original opinion, which is the only thing that I've seen, I've -- my recollection is that he explicitly states what the U.S. Trustee's position was and he rejects it. He rejects, in the opinion, the U.S. Trustee's argument, or his --

MS. SCHWARTZ: Perception.

THE COURT: -- perception of the argument that your office's position was that there was a categorical bar.

MS. SCHWARTZ: Correct. And at the hearing, on the application that the Creditors took to go right to the Circuit to appeal the 1129(a)(4) issue, we clarified that for Judge Sullivan, stating clearly on the record that we had never argued that in our papers.

THE COURT: Okay. So was -- is he --

MS. SCHWARTZ: It was a misperception.

THE COURT: Okay, so now, is the upshot of all of that, which, just to be clear --

MS. SCHWARTZ: Yes.

THE COURT: -- this is the first I'm hearing of it.

MS. SCHWARTZ: I understand that, Your Honor.

THE COURT: So is the upshot of that, that as we go forward to resolve this now, and hypothetically, I were to grant a substantial contribution claim for -- I'm going to make up a number that's not on -- a million dollars in the aggregate, say a million dollars, that -- and then there were an appeal -- well, question. If the applicants chose to appeal, they would choose to appeal. But would your office be pursuing an appeal based on the argument that there's a categorical bar?

MS. SCHWARTZ: Absolutely not.

THE COURT: Okay, so we are -- so we are engaged now on the issue of fulfilling what Judge Sullivan actually said in his original opinion, which was the entitlement to a substantial contribution claim for extraordinary work, work above and beyond what a normal Committee would do.

MS. SCHWARTZ: Well -- May I -- I would just like to address one thing.

THE COURT: Ms. Coffino, I apologize. I didn't mean to deprive you of your chance to speak, but this is a helpful clarification.

MS. COFFINO: Yeah, no, I agree.

MS. SCHWARTZ: It's just a clarification. Your Honor, he did not -- what he said was, just because a Creditor sits on a Creditors' Committee does not bar that Creditor from seeking a substantial contribution under the existing case law and standard, not a new standard that --

THE COURT: I --

MS. SCHWARTZ: -- wait, it's important, though, Your Honor, because at that hearing where they went to the -- for the certification, Judge Sullivan stated on the transcript, which, it's on the docket, he stated he believed that based on the other side's papers, they perceived that he had made a new standard, that there was a standard called above and beyond extraordinary services.

But what he was really saying and citing to Dana,

Bayou, all the existing cases, is that in order for the Creditors in this case, who have been paid to date in the aggregate, $30 billion dollars, in order for them to sustain a substantial contribution claim, they have to satisfy the existing elements, which Your Honor is familiar with. Actual and necessary benefit, direct, demonstrable benefit not just for them but for the --

THE COURT: Okay, but the operative quote from his opinion, okay, and you know, this creates a quirky --

MS. SCHWARTZ: Yes, it does, Your Honor.

THE COURT: -- this creates a quirky situation for me to deal with because I have his opinion and --

MS. SCHWARTZ: Right.

THE COURT: -- that's what I need to try to comply with.

MS. SCHWARTZ: You also have to look at his subsequent opinion, though, where he speaks to that.

THE COURT: Well, the -- the operative language from his first opinion was, "To the extent official Committee members performed extraordinary work to benefit the estate, above and beyond normal Committee duties, they may, as will be explained below, seek to be reimbursed under 503(b)(3)(d) and (b)(4). So --

MS. SCHWARTZ: Right.

THE COURT: The way I'm reading that, and I don't

think it's changed by what you're saying, I have yet to read -- let me finish --

MS. SCHWARTZ: Yeah.

THE COURT: -- is to the Committee members, don't ask for normal Committee fees. Don't ask for that. Right? Above and beyond normal Committee --

MS. SCHWARTZ: Right.

THE COURT: -- don't ask for that. Then we get to, well, what can you ask for?

MS. SCHWARTZ: Right.

THE COURT: And what you're saying is that 503(b), the normal showing applies.

MS. SCHWARTZ: Correct.

THE COURT: Okay.

MS. SCHWARTZ: And what I'm also saying, Your Honor, so I'm very clear, because I don't want this -- you know, I think we come to you in a very good positon. We've had discussions, Ms. Coffino will talk to you about our discussions and agree to a discovery schedule, all this good stuff that's coming to you.

But so that it's not a surprise to you, when we file our response, our view is, Your Honor, that all of those Creditors can file a substantial contribution motion for services they provided as a Creditor to the estate based on the existing standard wearing their individual Creditor

hat, but not the fact that, for example, they participated in 160 meetings to go to a --

THE COURT: Well, I want to go back to the statement that you made that we're in a good place, because --

MS. SCHWARTZ: Right.

THE COURT: -- from what you just said, it doesn't sound like a place I want to be, okay?

MS. SCHWARTZ: Okay, fair enough.

THE COURT: So let me -- why don't you have a seat --

MS. SCHWARTZ: Yes.

THE COURT: -- and let me -- let's have Ms. Coffino resume.

MS. COFFINO: Let me just address this issue first because we've been wrestling with it since the beginning the first time we were here before you when we said we had a threshold legal issue.

THE COURT: Speak up, if you would, Ms. Coffino.

MS. COFFINO: I'm sorry. You know, this -- every Committee member is a Creditor. Everyone that sits on a Committee is a Creditor, so I think that --

THE COURT: That's a good thing.

MS. COFFINO: But the -- the -- I think what the Trustee -- U.S. Trustee is distinguishing between is work

done qua Committee member, while you're on the Committee, actual Committee work, and work does as an individual Creditor totally outside the Committee's role. And we read Judge Sullivan's decision, and we don't think is subsequent conclusion that the standard is the same, the elements are the same, changes that, that you can get a substantial contribution as a Committee member for Committee work if you perform extraordinary work over and above the normal duties of the Committee. We just spent 11 months pulling apart our time records for that reason.

THE COURT: You see, so I don't -- so you are -- you are very far apart on what your view of what the law actually is now, because -- go ahead, Ms. Coffino.

MS. COFFINO: But we -- I mean, that is a legal issue. I'm sure that the U.S. Trustee will brief that issue at the appropriate time, but as far as proceedings going ahead on a factual basis, I think we are very close. We have an issue, one issue that --

THE COURT: Well, what does that mean? You -- what -- first of all, what are the total fees that are now being requested by the applicants?

MS. COFFINO: I think we shaved $7 million dollars off of it, so somewhere around $19 million dollars. It was $26-, it's now $19-.

THE COURT: And are you, without revealing

anything that would be in the nature of settlement discussions, are you engaged with the office of the U.S. Trustee on -- on arriving at a number that would result in a consensual order or are we embarking on a litigation path?

MS. COFFINO: No, we are embarking on a litigation, Your Honor. There hasn't been settlement discussions. I think this issue precludes a settlement discussion.

THE COURT: But see, that -- that's exactly where I started with my question to determine what we're doing, because we're -- we are now in a situation where, because the difference in opinion about what the legal standard is, okay, this isn't going to end anytime soon because if I make a -- if I make a ruling after a litigation and I go about an analysis of what qualifies for reimbursement as a substantial contribution, unless I adopt the qua Creditor view as opposed to the qua Committee member view.

Then we're going to -- we're going to keep going because there's going to be a continuing appeal, and I find it very problematic procedurally to take a decision and then -- and this is -- I'm very aware that there will be a transcript of this, this is not at all a criticism of Judge Sullivan, whose opinion I thought was crystal clear and I stood and stand ready, as I have to, on the remand to apply it. But now, I have what I would call a muddying of what I

had thought were clear -- clearer waters. So -- and I'll make it very clear that I think it's a waste of everyone's resources to have an extended litigation over this. I find it very problematic.

MS. SCHWARTZ: Your Honor, can I just address that because I think -- I think I would address your issue on resources. First of all, as far as an appeal is concerned, in the Creditors' papers, Your Honor would have seen that they intend to go, take an appeal, after you rule because they're going to appeal that 1129(a)(4) issue no matter what happens here, and they put that in their papers. So as far as an appeal is concerned, they've already advised the Court, that's what they're doing. So that's one component part. I want to just be clear about that.

With respect to why he's --

THE COURT: So let me understand this. If I, after a trial or a lack of objection by the U.S. Trustee, if I were to enter an order granting the relief you request, pursuant to a revised application, you're going to appeal?

MS. COFFINO: No --

THE COURT: You're going to appeal from an order granting --

MS. COFFINO: -- we reserve our right to appeal the 1129(a)(4) issue. For our part, Your Honor, we tried to avoid all this.

THE COURT: Didn't that ship already sail?

MS. COFFINO: No, we asked -- we asked if it was an interlocutory order. We asked for the Judge to certify it to the Second Circuit so we could avoid this very circumstance that we're in now, and he refused to do it, so we're back here. We had no choice. We thought we should be --

THE COURT: So I'm going to go through, potentially, a long, contested trial going through thousands of pages of time records, applying, potentially, two different standards, and then, no matter what I do, there's going to be an appeal?

MS. COFFINO: That's -- on the 1129(a)(4) issue, I believe that's right. Unless there's some form of settlement, yes.

MS. SCHWARTZ: That is --

MS. COFFINO: We tried to avoid it.

MS. SCHWARTZ: -- exactly what they say in their papers, and the money that they say that they've taken --

THE COURT: You can avoid it. You can just not do it.

MS. COFFINO: Your Honor, with the -- anyone can give up their rights.

MS. SCHWARTZ: Your Honor, that $7 million that they say they've shaved off, that's -- they're going to seek

that for their appeal. That's all reserved for their appeal. So -- but let's talk about positive things for a moment, if we can, try to shift it back a little bit, because there are some.

THE COURT: The sun's out today.

(Laughter)

MS. SCHWARTZ: But there are some.

THE COURT: It's not raining.

MS. SCHWARTZ: But there really are some. There really are some. Okay. Your Honor, we -- since they've filed their papers, we've had a bunch of discussions with the Creditors. There hasn't been radio silence or anything like that. We've exchanged discovery schedules, we've resolved how to get by certain discovery issues that we had. With respect to some of the issues, Your Honor, we're willing, if the other side is willing, if they want to -- we're going to talk because we'll have a 26(f) conference with them next week, but we're willing, if they're willing to stipulate to certain things, that's going to narrow discovery. But let me just point out a few things because I think this is very important --

THE COURT: But do you hear the words that you're saying, Ms. Schwartz? The words that you're saying are discovery. It's May of 2016, so we're talking about discovery of what these folks and their counsel did seven,

eight, six, five years ago. It's absurd.

MS. SCHWARTZ: Not really because, let me say this, if you read the services that they assert that qualify for the substantial contribution claim, for example, serving as a parallel management team when Alvarez and Marsal was the management team for the Debtors and was paid over $600 million dollars for that service, it's not absurd to be able to take discovery because the law says that a substantial contribution claim is to be narrowly construed to not mushroom the administrative expenses.

THE COURT: So that one, as an example, for that one, it really wouldn't matter whether it's qua Committee or qua Creditor because you would say --

MS. SCHWARTZ: It's duplicated and it wouldn't make the standard.

THE COURT: -- you would say no way, no how, no matter what.

MS. SCHWARTZ: Correct, and that's what I'm trying to say to you, Your Honor, that that qua -- the way you said it very elegantly, qua Committee, qua individual --

THE COURT: That was -- I stole it from Ms. Coffino.

MS. SCHWARTZ: Okay, Ms. Coffino. But that's just one issue. Your Honor, they say that they worked really, really hard. Well, the case law says that just because you

had extensive participation, you don't necessarily get a substantial contribution claim.

Importantly, Your Honor, what the case law says is that when you have retained professionals, and in this case, the Committee had no bank, (indiscernible) --

THE COURT: Okay, Ms. Schwartz, I appreciate that if I said to you right now give me a closing argument, you could, okay, but I'm not going to do that today.

MS. SCHWARTZ: But the point is this --

THE COURT: I under -- I understand the point. Let me ask a different question of Ms. Marcus.

MS. COFFINO: Sure. Thank you, Your Honor.

THE COURT: So, you indicated that, as if this point you're, you know, agnostic a bystander. Is it the plan administrator's intent to remain on the sidelines?

MS. MARCUS: Well, Your Honor, yesterday, or I guess late last week when I spoke to Ms. Schwartz was the first that we've heard about the new discovery initiative and frankly, it's very troubling to us because on the one hand, we want to stay on the sidelines. On the other hand, any discovery will necessarily involve the Debtor's participation, I believe.

THE COURT: Well, let me ask about the sideline concept, because if this were a normal case, and -- or a regular big case, for example, a substantial contribution

application would be made as part of the claims process, and the Debtor in the first instance, the reorganized Debtor, would respond to the application. Right?

MS. MARCUS: Yes.

THE COURT: Okay. So -- and that's because the Debtor has a -- reorganized Debtor has a stake in not paying out admin expense money, right?

MS. MARCUS: Correct.

THE COURT: Okay. So, it is at least theoretically possible that the plan administrator could look at all this and, well, in a more routine 503(b) application, you might say yeah, I think you played an important role in the case. It's not worth $10 million dollars, it's worth a million dollars. And it could be settled on that basis.

MS. MARCUS: Correct.

THE COURT: Correct?

MS. MARCUS: Yes, but my understanding is that even if, and we haven't engaged in settlement discussions, but even if we did engage in settlement discussions with the Committee representatives, we would also have to get the office of the U.S. Trustee on board because they've obviously taken a much greater role in this dispute than we have. So it would be a three-way discussion.

THE COURT: Sure. It would be a three-way

discussion, but if there were to be a consensual resolution, like any consensual resolution, someone could object.

MS. SCHWARTZ: I think it's also not the normal situation, Your Honor, because the Debtor had agreed to that permissive plan provision. So you see, from the outset, the Debtor was willing to pay them. They were willing to pay them as a plan provision.

THE COURT: Okay, but the Debtor stands corrected by Judge Sullivan and everyone --

MS. SCHWARTZ: Well, I just don't see their incentive to play a large role in now what the Creditors try to make a substantial contribution claim when initially, they were like -- it's only -- remember, Your Honor, this is a big case, right? So the Debtor --

THE COURT: Yeah.

MS. SCHWARTZ: -- when they were coming up with the consensual resolution, although we don't know this but we'll inquire and we'll find out, $26 million and Andrea Schwartz as an individual doesn't believe this, but in the context of this case, it's a drop in the bucket.

THE COURT: I understand, but my point is that now -- okay --

MS. COFFINO: May I speak?

THE COURT: All right --

MS. MARCUS: Can I say one more thing, Your Honor?

Where we are very concerned that the discovery that the parties are talking about now is going to consume more than -- not more than but consume quite a lot of estate assets. We've wound down the estate, there are much fewer employees at the estate, and the last thing we want is to spend all the money on discovery.

THE COURT: Okay. All right. Okay, so go ahead, Ms. Coffino.

MS. COFFINO: Just by way of background, the original application had two legal theories, 1129(a)(4) in the plan provision, 503(b). The Debtor did submit -- the CEO submitted a declaration in support of that and said we had made a contribution in his view. That said, for our part, we're happy to sit down with anyone. We have -- you know, we're not looking forward to six months of intensive discovery here.

We tried to avoid it by going directly to the Second Circuit. But we're happy to talk to the Debtor and we're happy to talk to the U.S. Trustee about a settlement. If they're willing to (indiscernible)

THE COURT: But that's inconsistent with the notion that even if I were to grant your application in the full amount, you're going to appeal.

MS. COFFINO: But we could avoid the 503(b), you know, proceeding. It's a legal -- it's just an appeal,

legal documents. It's not six months of discovery and depositions.

THE COURT: Okay, so what's your idea of what should happen next?

MS. COFFINO: Well, as Ms. Schwartz was telling you, we have had very productive sections in working out a scheduling order. We had one stumbling block. We wanted the UST to file a response, and other parties, wanted to set a deadline for responses so that we knew who -- what positions people were taking before discovery started. They didn't want to do that. This morning, they have offered to file a response by July 17th, and we can live with that, and there's some -- you know, the overall discovery schedule, we -- the timing I think we're in agreement on. There may be some nuances for internal deadlines that we need to work out. I think we're so close that we'll get there. I do believe that the U.S. Trustee also feels that way and that we'd be ready to submit a scheduling order to you.

MS. SCHWARTZ: And like I said, Your Honor --

THE COURT: But we're going to have to have a trial.

MS. COFFINO: Yes, I think so, unless --

MS. SCHWARTZ: Unless the Creditors decide that they're going to waive their substantial contribution claim and just take their appeal in 1129(a)(4) because -- because

Judge Sullivan said, hey, I can't certify it and besides, it's got to go back to Bankruptcy Court, you know, if they waive their substantial contribution claim and just take their 1129(a)(4) to the Circuit, you avoid the discovery at the bankruptcy level.

MS. COFFINO: Well, waiving our rights, Your Honor, we're happy to sit down with anyone and talk about an amicable resolution.

THE COURT: Okay.

MS. COFFINO: And we --

MS. SCHWARTZ: And I will say, Your Honor, we have -- we really have tried and we, the parties, we're -- I think we're in a pretty good state in terms of that. I was the one who called Ms. Marcus to come today, to this hearing. I also called Committee counsel, Mr. O'Donnell is here, sitting in the back, because I thought that, to the extent we're going to be entering a discovery schedule and that this was on the docket, they should be aware of it. I thought as a matter of courtesy that they should be here. And I will say that we're going to have a 26(f) conference. I really, truly believe, Your Honor, that there's going to be a narrowing of issues, based on my conferences that I've had with the other side. The other thing --

THE COURT: We're -- hold on. Hold on. First of all, you should be aware that, between the beginning of June

and the end of 2017, I have nine Lehman trials already scheduled. Nine. So the concept that there's calendar room for this is questionable. That's point number one. Point number two is, before we embark on this exercise, we're going to have a conference, okay? So you're all here now. I'd like you to take a seat. I want to hear the other matter that's on the calendar, and then we're going to continue to talk.

MS. SCHWARTZ: Okay.

THE COURT: All right? Thank you.

MS. MARCUS: Your Honor, the next matter on the calendar, it's an uncontested matter, and it's going to be handled by Wollmuth.

THE COURT: This is --

MR. STRONG: This is matter number 5 on the agenda for today.

THE COURT: This is the post-petition interest?

MR. STRONG: The LBHI's second motion in aid of the indemnification claim's ADR order.

THE COURT: All right.

CLERK: Do you have the (indiscernible)?

THE COURT: I mustn't have the right agenda.

MR. STRONG: I can pass up the agenda, Your Honor.

(Judge confers with Clerk)

THE COURT: Okay, the reason for my confusion is

because this is different from the agenda that I have. So, it is not me.

MS. MARCUS: Sorry about that, Your Honor.

THE COURT: This is -- what you just handed me is different from the one that I'm looking at. So this is an uncontested matter than relates to ADR.

MR. STRONG: Yes, Your Honor.

THE COURT: Okay. I'm sorry. Just trying to be clear.

MR. STRONG: That's fine, and I apologize for any confusion with regards to the agenda.

This motion that we're here for today, first let me note my appearance. Fletcher Strong of Wollmuth Maher & Deutsch here on behalf of the Debtors. Also with me is my colleague, Jim Lawler, the partner on the case. The motion on the Court's calendar for today is LBHI's second motion in aid of the indemnification claim to the ADR order. And as background, the Court entered the indemnification claims ADR order June 2014, which created a mandatory mediation process to resolve thousands of contractual indemnification claims that Lehman holds against originators and other sellers of defective mortgage loans to Lehman.

THE COURT: Right. So this is going forward -- the objectors with -- the order as it applies to certain objectors is being adjourned out to the June date.

MR. STRONG: Yes, Your Honor. That's correct.

THE COURT: Okay. All right.

MR. STRONG: There were four objections filed, all objectors and all informal objectors that have reached out to Debtor's counsel have been notified of the adjournment to the June hearing.

THE COURT: Okay, got it. So we're carving out K&B Capital, Selco Community Credit, Skyline and TargetRate.com.

MR. STRONG: Correct, Your Honor.

THE COURT: Okay. All right, so you'd like me to enter the order with respect to the non-objecting parties?

MR. STRONG: Correct. We anticipate filing of the revised proposed order later today.

THE COURT: Okay. All right. Now that I see what you're talking about, I'm good, and we'll enter that order when we get it.

MR. STRONG: Okay, thank you, Your Honor.

THE COURT: All right, thank you very much. Sorry for the confusion. Let me hand this back to you. Thanks. Okay?

MS. MARCUS: I apologize for the confusion, Your Honor.

THE COURT: No problem.

MS. MARCUS: I think maybe what happened was we

had sent an advance version and then as always happens, things changed, so.

THE COURT: Yes, it gets updated. Okay.

MS. MARCUS: Apologies for that.

THE COURT: No problem.

MS. MARCUS: So the last item on the agenda, it is the last for today, is number six, and it's the plan administrator's five hundredth ninth objection to claims, ECF No. 51006.

THE COURT: Right. Okay. So on that one, I have the original document and then I have three objections, one with respect to each of the three claims, and then there's a supplement with respect to claim 66154, and then looking out there, I'm also aware that there's now a motion to abstain.

MS. MARCUS: That's correct. Your Honor, actually, three supplements, one for each of the objections.

THE COURT: One for each one, okay. All right, so --

MS. MARCUS: And the Debtor's reply that was filed on Friday.

THE COURT: Okay. So how shall we approach this?

MS. MARCUS: Well, I think we have a gating issue, that's the elephant in the room --

THE COURT: Yes, right.

MS. MARCUS: -- so why don't we talk about that

first?

THE COURT: The tolling agreement. Is that the one? Is that the elephant?

MS. MARCUS: That's it.

THE COURT: Okay.

MS. MARCUS: So, Your Honor, as you know, because you obviously read the papers, the Iron Bridge entities have attached to their pleading a copy of a tolling agreement, which they contend precludes the plan administrator from moving forward today. As noted in our reply, the language of the tolling agreement appears to preclude the prosecution of the objection. However, as we've noted, we believe that the Iron Bridge entities are estopped from relying on the tolling agreement at this late date.

THE COURT: The thing that I don't understand is looking at the tolling agreement, it can be terminated on 30 days' notice.

MS. MARCUS: That's correct, Your Honor. Why didn't we do it? Because we didn't realize that the tolling agreement covered under the Garfield County action (indiscernible) the claims.

THE COURT: The claims?

MS. MARCUS: Yes.

THE COURT: Okay. Well, I appreciate that because you might have made the argument, actually, that while it

tolled the latter, the Garfield County action, that you never intended to give up the ability to prosecute the claims, so -- but then -- so, if I read the tolling agreement correctly, which is just on 30 days' notice you can terminate it, I mean, we can either get started today or you can give the notice today and we can come back in 30 days.

MS. MARCUS: That's exactly what I was going to say, Your Honor, and we just think, having been through everything we've been through, I mean, the objection was filed in September, adjourned repeatedly for months and months and months --

THE COURT: Right, so, I mean, as I -- you know, as you know, I like to be practical. I don't really like to waste everyone's time. So.

MS. MARCUS: That's what we'd like Your Honor to do, but obviously --

THE COURT: Okay.

MS. MARCUS: -- Mr. Barber may have a different view.

THE COURT: Yes.

MR. BARBER: I'm all for practicalities, Your Honor.

THE COURT: Okay.

MR. BARBER: Duncan Barber on behalf of the Iron

Bridge Creditors.

THE COURT: Okay.

MR. BARBER: Tracy Klestadt with me here at counsel table. Thank you for clearing up the snafu on my fee for pro hoc vice this morning.

THE COURT: I didn't do a thing, but you're welcome.

MR. BARBER: So maybe your staff did.

THE COURT: Somebody on my staff, okay.

MR. BARBER: Right. We filed -- the claim objection was originally filed in mid-September and long relationship with Ms. Arthur and Ms. Marcus and we put our heads together and said we can crack this nut. We failed. That did result in a claim objection that we filed on March 23rd of this year.

A week later, in the tolled litigation in Colorado that includes the same claims that formed the basis of the claim objection, the Debtor filed a status report that I referenced in my papers, continuing to kick that ball down the road as a result of the tolling agreement.

I looked at that, circled back, and said, gee, I think this is encompassed within it too. Of course, our goal is, obviously, resolve all claims in one case with one Judge with all parties. That said, it does seem to me that -- actually, it's no -- there's no question, the tolling

agreement applies, number one. Number two --

THE COURT: Okay, but, so Ms. Marcus just said that if you're going to take that position, then she's being quite candid, they'll send you a letter notifying you that it terminates.

MR. BARBER: Right. Then I would ask for two things. Number one, if they do that, I have an assumption why they haven't, but that's an assumption on my part, but if they were to do that, I would ask two things. One, our preliminary stay relief hearing that then will have to get set be set contemporaneously with our motion to abstain, so that we just hear those all at once.

THE COURT: You -- you know, I read all the papers but I'm very confused. Is the Colorado action entirely encompass exactly the same things as the claims and the claim objection?

MR. BARBER: They -- but in terms of the complaint that's been filed since November of 2011, it duplicates the core objection to claim that's asserted here to the three proofs of claim and then adds some tort claims because I think they think in terms --

THE COURT: But I'm just, you know, I still don't understand why all that's going on.

MR. BARBER: I'm sorry, why what?

THE COURT: I don't -- I just don't understand --

just don't understand procedurally why all this is going on. There are claims that are filed here, right?

MR. BARBER: Correct. Correct.

THE COURT: And then how did that -- and who's the Plaintiff in that litigation?

MR. BARBER: Okay, let me -- let me -- yeah, sure, let me explain that. We filed proofs of claim --

THE COURT: Yes.

MR. BARBER: -- here.

THE COURT: Right.

MR. BARBER: The Debtor sued on the same facts and transaction debt issue in our proofs of claim in November of 2011. The Debtor is the Plaintiff.

THE COURT: Okay.

MR. BARBER: Sued these three Claimants --

THE COURT: Okay.

MR. BARBER: -- and a host of other people that they say are on our side of the equation, if you will.

THE COURT: Okay, and then you entered into the tolling agreement.

MR. BARBER: Yes, and we filed a stay relief motion. If you're going to file the complaint, we need to get stay relief so we can defend.

THE COURT: Okay, all right.

MR. BARBER: We did, they postponed it, they said

let's wait --

THE COURT: Okay, so pause, pause.

MR. BARBER: Okay.

THE COURT: Time out. So we're only going to -- so this is only going to happen one place, right? It's either going to happen here or it's going to happen there. So Ms. Marcus, what does the plan administrator want to do here?

MS. MARCUS: So, Your Honor, may I speak from here? Is that okay?

THE COURT: Sure, yeah.

MS. MARCUS: When we filed the Garfield County action, we were believing that we could obtain affirmative relief against the Iron Bridge entities as well as other defendants. We've come to learn that the Iron Bridge entities really don't have very much in the way of funds. In fact, I think one of them, at least one of them may have been dissolved. So our view is that the claims against these three entities would be heard here, and if necessary, we can dismiss the Garfield County action as to those three entities, not as to the other defendants, however.

THE COURT: Okay.

MR. BARBER: The issues in Garfield County are exactly just --

THE COURT: Okay, but she just said, Ms. Marcus

just said she's going to let you out of that action.

MR. BARBER: You know, that hasn't happened. The way things are currently postured, that has not happened. And there is --

THE COURT: Look, we're now -- let's introduce the other elephant in the room, okay? You'd rather have your claims resolved in Colorado than here. Let's face it.

MR. BARBER: Actually, we'd rather have all of it resolved with all the defendants.

THE COURT: She can't -- Ms. Marcus can't do that because their other defendants are not subjects to this Court's jurisdiction.

MR. BARBER: Okay, let's --

THE COURT: Mr. Barber?

MR. BARBER: Yeah? There's another important point.

THE COURT: The important point is the following: that the practical solution is either you agree today that the tolling agreement doesn't apply, or if you don't, Ms. Marcus is going to be good to her word and I'll hold her to it, she'll send a notice and we'll run out the 30 days. In the meantime -- in the meantime, unless you take the position that her filing a motion or a notice of discontinuance with respect to your clients in the Colorado action is itself barred by the forbearance agreement, which

you may, then she will also, within a period of time which she will commit to, on the record, endeavor to do that. You will -- your clients will then be no longer involved in the lawsuit in Colorado in which Lehman is the Plaintiff. You then no longer have an argument to do anything but have your claim resolved here, like any other Creditor.

MR. BARBER: I think the tolling agreement applies.

THE COURT: Okay, so you're not going to be practical. Ms. Marcus, you're going to have to send a letter, which, to clarify, Mr. Barber, if you believe that the prior -- that that means that prior to the 30 days, Ms. Marcus can't take any steps to dismiss your client out of the lawsuit that's pending in Colorado. Does the tolling agreement preclude her from doing that?

MR. BARBER: I think technically it does, okay? And my clients aren't here for me to talk to them, okay?

THE COURT: But this is a -- this is a technical, legal point, and I'm sure that they're going to take your advice on it, so why don't we do this, Ms. Marcus? Why don't we leave it that you're going to have to issue your notice, and then Mr. Barber, if you would get -- after you've had an opportunity to confer with your clients, get back to Ms. Marcus and let her know if your position is that the tolling agreement precludes her from taking any

necessary action, I have no idea what it is, in Colorado to either move by notice or by motion, to dismiss your clients from the Colorado action. If your position is that she's free to do that sooner than the running of the 30 days, Ms. Marcus, you can proceed --

MS. MARCUS: Yes, Your Honor.

THE COURT: -- to do that. If the position is that the 30 days has to run, then you can do it on the 31st day after the giving of your notice.

MR. BARBER: Okay. We're talking about elephants in the room. Can I identify one other?

THE COURT: Sure.

MR. BARBER: Okay.

THE COURT: Other than Mr. Klestadt?

(Laughter)

MR. BARBER: He's obvious. A core issue between the Debtors and Iron Bridge and the affiliate -- and the people affiliated with Iron Bridge, okay, is the construction defect litigation, which I've been told you're aware of, okay?

THE COURT: Yes.

MR. BARBER: That construction defect litigation had one tiny bit more to go that will queue it up in a correct posture for the Debtor and the Iron Bridge side to determine liability between them for what happened. The

arbitration award was entered, the jury verdicts were entered. The jury -- there's a bunch of motions surrounding the jury verdicts. They haven't been reduced to judgment. The Judge yesterday sent a -- set a hearing for July 10th to resolve those pending motions, which shortly thereafter, we all anticipate that the jury verdicts will be committed to judgment. At that point, it will now be a time when claims between the Debtor and the Iron Bridge side will have to be determined as between them.

THE COURT: Okay.

MR. BARBER: Okay?

THE COURT: Okay in the sense that I hear you, okay.

MR. BARBER: I hear you, right, and I'm just trying to get that on the table because that's an important part of what will be resolved in this claim.

THE COURT: Okay. All right. All right, so Ms. Marcus, do you disagree with Mr. Barber's characterization of the impact of that particular aspect?

MS. MARCUS: Well, Your Honor, first of all, I certainly wasn't aware that the Judge had set a July 10th hearing which --

MR. BARBER: I found out yesterday.

MS. MARCUS: -- I'll be glad to hear. I don't know if Ms. (indiscernible) knew either. Our view is that

that litigation is really separate and apart from these claims, but if you give me a moment to consult with my client --

THE COURT: Okay, but I guess the point is that if that's going to happen on July 10th, then we get to the same place by giving you an adjourned hearing date subsequent to that time, and -- I mean, I'm flying blind at this point, because this is all news to me.

MR. BARBER: From a practical standpoint, (indiscernible) me, let's see what the Judge does do.

MS. MARCUS: May I have a moment to consult, Your Honor?

THE COURT: Sure. Sure.

(Counsel confers with client off the record.)

THE COURT: Look, you know, Ms. Marcus, as you know, Mr. Barber, I'll say it to you, Mr. Klestadt knows as well, I'm not going to -- I don't want to ambush anybody, so to the extent that we are all -- new facts are emerging as we're all here and you need time to figure out how everything fits together, that's completely fine. I don't want to prejudice anybody from being able to do a thoughtful analysis of where things stand. My bottom line message remains the same, is that I'd like to be practical and you did indicate that you were talking settlement and that you got to an impasse. If you believe that additional

settlement discussions would be fruitful, that would be great. If you think that you might be assisted by one of my colleagues who don't have a lot of free time these days but tend to say yes when I ask them to do something, that would be another option. It does sound -- to me, looking at the merits, this is crying out to be settled.

MS. MARCUS: Your Honor, you took the words right out of my mouth. In fact, that's exactly what I was going to say, that these claims, they're significant, obviously, for the Claimants, they're significant for the Rose Branch estate, but in the scheme of Lehman as you heard Ms. Schwartz say, they're not very significant claims.

THE COURT: So, Mr. Barber, would your clients -- could you inquire as to whether, free of charge, your clients would be interested in participating in a mediation under the auspices of a sitting Judge in this building?

MR. BARBER: I definitely will ask.

THE COURT: Or in the Southern District of New York.

MR. BARBER: Yeah. Okay, my personal practice style, we've never met, is keep at settlement, if you can get it, you get there.

THE COURT: We did meet years ago, you just don't remember.

(Laughter)

MR. BARBER: Now, that's a hamper.

THE COURT: Now that's going to make your really nervous because I remember and you don't.

MS. MARCUS: Your Honor, if I might add, I think that one of the issues that we've been struggling with in terms of trying to get to a settlement is that the Claimants here believe, and I believe that it's a sincere belief, that their claims are very much wrapped up with the homeowners' litigation and the arbitration proceeding in Colorado --

THE COURT: And you don't?

MS. MARCUS: -- and we don't.

THE COURT: Right.

MS. MARCUS: And that's been the stumbling block.

THE COURT: But I think that -- I think that if we -- if we teed up a mediation, and I have a couple of my colleagues in mind who are particularly experienced in just exactly this type of dispute, it might be an illuminating exercise for everyone. If there's a issue of -- I don't know if there's a hardship issue in having one of your clients come to New York?

MR. BARBER: Your Honor, a settlement necessarily includes the defect litigation.

THE COURT: But the --

MR. BARBER: Okay, but is there a hardship issue, no, there's not a hardship issue. Can I have a -- can I

have a client representative or representatives here with me in New York for a mediation? Absolutely.

THE COURT: Okay. I mean, look, if you -- I mean, everything would be on the table, and that would be one of the issues on the table. You know, if the parties agree, then there wouldn't be a need for a mediation. Obviously, you don't agree and I imagine that -- you have to get more information around exactly what's going to happen in this July date because that seemed to be a new fact. So why don't you have conversations --

MR. BARBER: I definitely will.

THE COURT: -- all right, and you know, we'll say that the 30-day -- you know, you're going to have to deal with the procedural issues as well. I would encourage you to come to some kind of a global resolution, but in the absence of that, Ms. Marcus, you'll file the piece of paper you have to file, and then, you know, just let me know and I will make a couple of phone calls and I think that -- I think it would be a positive experience.

MR. BARBER: Great.

MS. MARCUS: Okay.

THE COURT: The price is certainly right.

MR. BARBER: Appreciate it.

MS. MARCUS: Thank you, Your Honor.

THE COURT: All right, so I'm going to adjourn

this without date and I'll leave it to the two of you just to get back to my Chambers with what you want to happen next, and if we don't hear from you after a certain amount of time, we will be calling.

MS. MARCUS: You know how to find us, and Your Honor, what do we do in the meantime about Mr. Klestadt's extension motion? That's on for June 2nd. It'll be part of that --

MR. BARBER: (Indiscernible) contract (indiscernible).

MS. MARCUS: Okay. Okay, perfect. Thank you, Your Honor.

MR. BARBER: And a Shelley Chapman is scratching a memory back there.

THE COURT: Yup. You'll figure it out.

MR. BARBER: I'm going to. Thank you, Your Honor.

MR. KLESTADT: Thank you, Your Honor.

MS. MARCUS: That concludes the hearing, Your Honor.

THE COURT: All right. Ms. Marcus, do you want to remain for the conference?

MS. MARCUS: Yes.

THE COURT: Okay, thank you. So I think what we'll do so that we can have a more productive discussion is just go -- go into the conference room.

MS. SCHWARTZ: Your Honor, is it possible to stay on the record because of the possible appeal issues?

THE COURT: I'd like to have a conference.

MS. SCHWARTZ: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 11:38 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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